# Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-386-1995
GOPAL SRI RAM, NH CHAN AND MOKHTAR SIDIN JJCA
30 APRIL 1997

***Land Law*** *— Restraints on dealings — Caveats — Application for removal of caveat — Application by purchaser of land who had paid the full purchase price — Whether bona fide purchaser for valuable consideration — Whether purchaser was an aggrieved person — National Land Code 1965 s 327(1)*

***Land Law*** *— Sale of land — Fraud alleged — Whether actual fraud proved — Whether grave suspicion was proof of fraud*

***Land Law*** *— Restraints on dealings — Caveats — Caveatable interest — Failure to state nature of claim forming the basis of application — Whether caveat should be removed — National Land Code 1965 s 323(2), (3), Form 19B*

***Land Law*** *— Sale of land — Beneficial ownership — Bona fide purchaser for value — Purchase price paid in full — Whether vendor a bare trustee for purchaser*

***Land Law*** *— Indefeasibility of title and interests — Conclusiveness of register — Effect of non-registration as trustee under s 344 of the National Land Code 1965*

***Land Law*** *— Acquisition of land — Vesting order — Whether court could grant vesting order — Effects of a vesting order*

***Limitation*** *— Land, recovery of — Accrual of cause of action — Land alleged to be under trust — Failure of trustee to deliver transfer and issue document of title — Land sold by trustee — When cause of action for recovery of land accrued — Whether cause of action statute-barred — Limitation Act 1953 s 9*

The first appellant was the sole executrix of Goh Keng How, deceased ('Goh'). In January 1989, Goh entered a private caveat as the managing partner of Mingshu Syndicate claiming a caveatable interest in the land in question ('the land') which was subsequently extended by ex parte order of court dated 20 June 1994. The basis of his claim to the land was that he had a caveatable interest on the land by virtue of a certain document which indicated his interest in the land. The second appellant ('Ho') entered a private caveat in 1994 against the land as a partner of Mingshu Syndicate.

The appellants claimed that by a trust instrument dated 2 July 1963 executed by one Long Yoke Wee ('Long'), Long held the land on trust for Mingshu Syndicate. However, the registration of Long as trustee and the deposit of the trust instrument was never done. Goh had stated in his affidavit that on 2 November 1968, Long had agreed to deliver but failed to deliver by 4 November 1968 the blank transfer form relating to the land.

By a sale and purchase agreement dated 25 June 1993, the respondent purchased the land from Long. The respondent affirmed in his affidavit that Long had assured him the land was free from all encumbrances and that he would apply for the removal of Goh's caveat, and this was done. A

The respondent, who was allowed to intervene and be added as a defendant in Originating Summons No 24–440–1994 (see [1995] 3 MLJ 6), sought, inter alia, the following orders: (i) the ex parte order dated 20 June 1994 extending the private caveat entered by Goh against the land be set aside and the private caveat be removed forthwith; (ii) the private caveat entered by Ho against the land be removed; and (iii) any proper registering authority be directed under s 417 of the National Land Code 1965 ('the Code') to register the respondent as the proprietor of the land notwithstanding any caveats, and in the event of any compulsory acquisition of the land, the compensation or award be paid to the respondent. B C

The judge found in favour of the respondent and made orders setting aside the order which extended Goh's caveat and removing Goh's caveat and Ho's caveat. The judge also made a vesting order vesting the land in the name of the respondent, and he further ordered that the acquisition award be paid to the respondent. The appellants appealed to the Court of Appeal against the whole of the decision of the judge. D E

Two primary issues before the court were: (i) whether the respondent was an aggrieved person; and (ii) whether Goh's and Ho's caveats should be removed, which called for an enquiry into whether the appellants and the real claimants, Mingshu Syndicate, had any caveatable interest in the land. F

The appellants contended that the respondent was not an aggrieved person because he was not a bona fide purchaser of the land, he had notice of Goh's caveat, and the consideration of RM8m appeared not to have been paid under the sale and purchase agreement. It was contended that the entire transaction smacked of fraud and collusion. It was also contended by the appellants that because of the compulsory acquisition of the land, the court would be wrong to grant the vesting order. G

Other material issues considered by the court were: (i) the dissolution of Mingshu Syndicate on the deaths of its partners; (ii) limitation and laches with regard to the action filed by the appellants and Mingshu Syndicate against Long and the respondent in October 1994 for the recovery of the land; (iii) negligent acts and omissions of Mingshu Syndicate; and (iv) whether there was any serious question to be tried. H

I

**Held**, dismissing the appeal:

(1) The authorities are clear that fraud and conspiracy to defraud must be proved beyond reasonable doubt, and fraud must be actual fraud. There was no evidence that the respondent had

committed actual fraud in his transaction. Grave suspicion by the appellants was not proof of fraud (see p 499C–E); *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, *Saminathan v Pappa* [1981] 1 MLJ 121, *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 and *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 followed.

(2) The word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

In this case, it was clear from the evidence given that the full purchase money for the land had been paid by the respondent to Long. The relevant transfer under the Code in respect of the land duly executed by Long in favour of the respondent was given to the respondent together with the issue document of title for the land. Long had done everything he could as registered proprietor to transfer or divest his entire interest in the land to the respondent. Thus, Long had thereby become a bare trustee holding the bare legal title to the land on trust for the respondent who had become the beneficial owner thereof. Further, the respondent had no reason to disbelieve Long whose assurance he had relied upon.

Accordingly, the respondent was a bona fide purchaser for valuable consideration and therefore he was an aggrieved person entitled to make his application to the court under s 327(1) of the Code for the removal of Goh's caveat and Ho's caveat (see pp 499F–G, I, 500D–E, 501H–I and 502A); *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, *Yeong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614, *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 and *A-G of Gambia v Pierre Sarr N'Jie* [1961] AC 617 followed.

(3) Goh did not state the nature of his claim forming the basis of his application under s 323(2) of the Code. He also did not disclose what that so-called 'certain document' was and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be. Failure by a caveator such as Goh or Ho to state the grounds to support the caveat would be sufficient for the court to remove his caveat and dismiss his appeal, as there was no doubt that Goh, Ho or Mingshu Syndicate had no caveatable interest in the land (see pp 502B–I and 503A–B, F–H); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 followed.

(4) There is nothing in the Code or the Land Acquisition Act 1960 to prohibit the court from making a vesting order consonant with the justice of the case.

The effect of the vesting order was that the land was beneficially owned by the respondent. Even assuming the land had actually been acquired by the appropriate authorities, that acquisition does not take away the vested right of the respondent in the land or any proceeds of acquisition or sale arising therefrom.

In view of the then pending compulsory acquisition of the land, the judge was right in the circumstances to make the vesting order (see pp 504A–B, 505A–B and 506A–B).

(5) The order of payment of the award to the respondent was set aside as the proper procedure was for the respondent to apply to the Johor Bahru High Court for an order for payment out to him in the other appropriate Originating Summons No 24–122–1995 in which, on the application of the land administrator, the order for payment into court of the compensation award was made for the compulsory acquisition of the land (see p 506C–E).

(6) As there was no written partnership agreement produced and no proof to show that there was an agreement between the existing partners to continue in the event of the death of any partner, Mingshu Syndicate would have been dissolved on 18 May 1965 when the first death of a partner occurred by virtue of s 35(1) of the Partnership Act 1961 (see p 508B–F); *Khoo Yoke Wah & Ors v Lee Choon Yam Holdings Sdn Bhd & Ors* [1991] 1 CLJ 663 and *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237 followed.

(7) It was clear that Mingshu Syndicate's cause of action for the recovery of the land accrued when Long had failed or defaulted to deliver the transfer and the issue document of title to the land on 4 November 1968 when time began to run. In the event, Goh, Ho and Mingshu Syndicate were also barred by laches from asserting their interest in the land as against that of the respondent (see pp 509H and 510D–E).

(8) By allowing the title to the land to be registered in the name of Long as proprietor and not as trustee under s 344 of the Code, and in failing to deposit the trust instrument with the registry of titles, and in allowing Long to retain possession of the issue document of title, Mingshu Syndicate was clearly guilty of negligence or omission in arming Long with full power to deal with the land as proprietor over a long period of time. If Mingshu Syndicate had any prior equity in the land, it must be postponed to that of the respondent.

Further, under s 89 of the Code, the register document of title is conclusive evidence of title. Anyone making a title search in the registry would find Long as the registered proprietor, free of encumbrances and free of any trust, except the defective

caveats of Goh and Ho. They failed to state in their applications that the land was subject to a trust and they were estopped from relying on the trust against the respondent who would be prejudiced or misled by their misconduct (see pp 510H–I and 511A–C); *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 followed.

(9) All interested parties in respect of the claim to the land were before the judge, ie the appellants claiming the land for Mingshu Syndicate as its partners, and the respondent as the purchaser having paid the full purchase price for the land and aggrieved by the existence of the private caveats. On the facts of the case, there was no serious issue to be tried, and the question of balance of convenience or balance of justice did not arise (see p 512E–H).

**[Bahasa Malaysia summary**

Perayu pertama merupakan wasi tunggal Goh Keng How, si mati ('Goh'). Dalam bulan Januari 1989, Goh mengemukakan kaveat persendirian sebagai rakan urusan Sindiket Mingshu dengan menuntut kepentingan boleh kaveat dalam tanah berkenaan ('tanah tersebut') yang kemudiannya dilanjutkan oleh perintah mahkamah secara ex parte bertarikh 20 Jun 1994. Dasar tuntutannya kepada tanah tersebut adalah bahawa dia mempunyai kepentingan boleh kaveat atas tanah tersebut disebabkan dokumen tertentu yang menunjukkan kepentingannya dalam tanah tersebut. Perayu kedua ('Ho') mengemukakan kaveat persendirian dalam tahun 1994 terhadap tanah tersebut sebagai seorang rakan Sindiket Mingshu.

Perayu-perayu mendakwa bahawa menerusi suatu instrumen amanah bertarikh 2 Julai 1963 yang dilaksanakan oleh seorang bernama Long Yoke Wee ('Long'), Long memegang tanah tersebut atas amanah untuk Sindiket Mingshu. Namun demikian, pendaftaran Long sebagai pemegang amanah dan deposit instrumen amanah tidak pernah dilakukan. Goh telah menyatakan dalam afidavitnya bahawa pada 2 November 1968, Long telah bersetuju menghantar-serah tetapi gagal menghantar-serah borang pindahmilik kosong berkaitan dengan tanah tersebut pada 4 November 1968.

Melalui suatu perjanjian jual beli bertarikh 25 Jun 1993, penentang telah membeli tanah tersebut daripada Long. Penentang mengesahkan dalam afidavitnya bahawa Long telah memberi jaminan bahawa tanah tersebut adalah bebas daripada segala bebanan dan bahawa dia akan memohon untuk pembatalan kaveat Goh, dan ini telah dilakukan.

Penentang, yang dibenarkan campur tangan dan ditambah sebagai defendan dalam Saman Pemula No 24–440–1994 (lihat [1995] 3 MLJ 6), memohon, antara lain, perintah-perintah berikut: (i) perintah ex parte bertarikh 20 Jun 1994 yang melanjutkan kaveat persendirian yang dikemukakan oleh Goh terhadap tanah tersebut diketepikan dan kaveat persendirian dibatalkan; (ii) kaveat persendirian yang dikemukakan oleh Ho terhadap tanah tersebut dibatalkan; dan (iii) mana-mana pihak berkuasa pendaftar yang

berkenaan diarahkan di bawah s 417 Kanun Tanah Negara 1965 ('Kanun tersebut') untuk mendaftar penentang sebagai tuan punya tanah tersebut tanpa mengira apa-apa kaveat, dan sekiranya ada apa-apa pengambilan wajib tanah, pampasan atau award dibayar kepada penentang. A

Hakim memihak kepada penentang dan membuat perintah mengetepikan perintah yang melanjutkan kaveat Goh dan membatalkan kaveat Goh dan kaveat Ho. Hakim juga membuat suatu perintah letakhak yang meletakhak tanah tersebut dalam nama penentang, dan beliau selanjutnya memerintahkan award pengambilan dibayar kepada penentang. Perayu-perayu membuat rayuan kepada Mahkamah Rayuan terhadap keseluruhan keputusan hakim. B C

Dua isu utama di hadapan mahkamah adalah sama ada: (i) penentang adalah orang terkilan; dan (ii) kaveat-kaveat Goh dan Ho patut dibatalkan, yang menghendaki siasatan sama ada perayu-perayu dan pihak menuntut sebenar, Sindiket Mingshu, mempunyai sebarang kepentingan boleh kaveat dalam tanah tersebut. D

Perayu-perayu berhujah bahawa penentang bukanlah orang terkilan sebab dia tidak merupakan pembeli bona fide tanah tersebut, dia mempunyai notis tentang kaveat Goh, dan balasan sebanyak RM8 juta nampaknya tidak dibayar di bawah perjanjian jual beli. Ia dihujahkan bahawa keseluruhan transaksi terdiri daripada fraud dan pakat-sulit. Ia juga dihujahkan oleh perayu-perayu bahawa disebabkan pengambilan wajib tanah tersebut, mahkamah adalah salah dalam memberikan perintah letakhak. E

Isu-isu material lain yang dipertimbangkan oleh mahkamah adalah: (i) pembubaran Sindiket Mingshu atas kematian rakan-rakannya; (ii) had masa dan kelewatan yang melampau berhubung dengan tindakan yang difailkan oleh perayu-perayu dan Sindiket Mingshu terhadap Long dan penentang dalam bulan Oktober 1994 untuk mendapat balik tanah tersebut; (iii) tindakan cuai dan peninggalan Sindiket Mingshu; dan (iv) sama ada terdapat sebarang persoalan serius untuk dibicarakan. F G

**Diputuskan,** menolak rayuan:

(1) Autoriti-autoriti jelas menunjukkan bahawa fraud dan persubahatan untuk memfraud mesti dibuktikan melampaui keraguan munasabah, dan fraud mestilah merupakan fraud sebenar. Tiada bukti bahawa penentang telah melakukan fraud sebenar dalam transaksinya. Rasa syak oleh perayu-perayu tidak merupakan bukti fraud (lihat ms 499C–E); *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, *Saminathan v Pappa* [1981] 1 MLJ 121, *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 dan *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 diikut. H I

(2) Perkataan 'terkilan' mesti diberikan makna biasa. Pihak yang terkilan bermakna seseorang tidak berpuas hati dengan atau terjejas oleh tindak-tanduk salah seseorang. Seseorang yang terkilan dengan itu adalah seseorang yang mana hak atau kepentingan sah terjejas oleh tindak-tanduk atau kelakuan orang atau badan yang lain. Kategori orang yang terkilan tidak pernah tamat.

Dalam kes ini, adalah jelas daripada keterangan yang diberikan bahawa wang belian penuh untuk tanah tersebut telah dibayar oleh penentang kepada Long. Pindahmilik relevan di bawah Kanun tersebut berkenaan dengan tanah tersebut yang dilaksanakan oleh Long memihak kepada penentang diberikan kepada penentang bersama dengan dokumen hakmilik keluaran tanah tersebut. Long telah membuat segala yang dapat dilakukannya sebagai tuan punya berdaftar untuk memindahmilik atau melucutkan kesemua kepentingannya dalam tanah tersebut kepada penentang. Maka, Long telah pun menjadi seorang 'bare trustee' yang memegang 'bare legal title' kepada tanah tersebut atas amanah untuk penentang yang telah menjadi pemunya benefisial ke atasnya. Seterusnya, penentang tidak mempunyai sebarang sebab untuk tidak mempercayai Long yang mana penentang telah bergantung kepada jaminannya.

Ekoran itu, penentang adalah pembeli bona fide untuk balasan bernilai dan dengan itu dia adalah seorang terkilan yang berhak membuat permohonannya kepada mahkamah di bawah s 327(1) Kanun tersebut untuk pembatalan kaveat Goh dan kaveat Ho (lihat ms 499F–G, I, 500D–E, 501H–I dan 502A); *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, *Yeong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614, *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 dan *A-G of Gambia v Pierre Sarr N'Jie* [1961] AC 617 diikut.

(3) Goh tidak menyatakan jenis tuntutan yang membentuk asas permohonannya di bawah s 323(2) Kanun tersebut. Dia juga tidak mendedahkan apakah 'dokumen tertentu' yang dikatakan itu dan ia adalah sama seperti tidak mempunyai apa-apa untuk menunjukkan kepentingan boleh kaveat yang dituntut olehnya atau Sindiket Mingshu. Dia gagal mendedahkan instrumen amanah dalam kaveatnya. Sesiapa yang membuat carian pada borang permohonan kaveat tidak akan mempunyai notis tentang apakah yang dituntut itu. Kegagalan oleh pengkaveat seperti Goh atau Ho untuk menyatakan alasan-alasan bagi menyokong kaveat adalah mencukupi untuk mahkamah membatalkan kaveat dan menolak rayuan, kerana tiada keraguan bahawa Goh, Ho atau Sindiket Mingshu tidak mempunyai kepentingan boleh kaveat dalam tanah tersebut (lihat ms 502B–I dan 503A–B, F–H); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 diikut.

(4) Tiada apa-apa dalam Kanun tersebut atau dalam Akta Pengambilan Tanah 1960 yang melarang mahkamah daripada membuat perintah letakhak mengikut keadilan kes. A

Kesan perintah letakhak adalah bahawa tanah tersebut dimiliki secara benefisial oleh penentang. Jika pun dianggap tanah tersebut memang diambil oleh pihak berkuasa berkenaan, pengambilan itu tidak merampas hak penentang dalam tanah tersebut atau sebarang hasil pengambilan atau jualan daripadanya. B

Memandangkan pengambilan wajib tanah pada masa itu, hakim adalah betul dalam membuat perintah letakhak itu dalam keadaan demikian (lihat ms 504A–B, 505A–B dan 506A–B). C

(5) Perintah bayaran award kepada penentang diketepikan kerana prosedur yang betul adalah untuk penentang memohon kepada Mahkamah Tinggi di Johor Bahru untuk suatu perintah bayaran kepadanya dalam Saman Pemula No 24–122–1995 yang wajar dalam mana, atas permohonan pentadbir tanah, perintah untuk bayaran award pampasan ke dalam mahkamah dibuat untuk pengambilan wajib tanah tersebut (lihat ms 506C–E). D

(6) Oleh kerana tiada perjanjian perkongsian bertulis dikemukakan dan tiada bukti bagi menunjukkan bahawa terdapat perjanjian di antara rakan-rakan yang masih hidup supaya perkongsian diteruskan sekiranya sesiapa daripada rakan-rakan meninggal dunia, Sindiket Mingshu telah dibubarkan pada 18 Mei 1965 apabila kematian pertama seorang rakan berlaku disebabkan s 35(1) Akta Perkongsian 1961 (lihat ms 508B–F); *Khoo Yoke Wah & Ors v Lee Choon Yam Holdings Sdn Bhd & Ors* [1991] 1 CLJ 663 dan *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237 diikut. E F

(7) Adalah jelas bahawa kausa tindakan Sindiket Mingshu untuk mendapat kembali tanah tersebut terakru apabila Long gagal atau ingkar menghantar-serah pindahmilik dan dokumen hakmilik keluaran tanah tersebut pada 4 November 1968 bila masa bermula. Malahan, Goh, Ho dan Sindiket Mingshu juga dihalang oleh kelewatan yang melampau daripada menuntut kepentingan mereka dalam tanah tersebut berbanding dengan kepentingan penentang (lihat ms 509H dan 510D–E). G

(8) Dengan membenarkan hakmilik kepada tanah tersebut didaftarkan dalam nama Long sebagai tuan punya dan bukan sebagai pemegang amanah di bawah s 344 Kanun tersebut, dan dalam kegagalan mendepositkan instrumen amanah dengan pejabat pendaftaran hakmilik, dan dengan membenarkan Long terus menyimpan dokumen hakmilik keluaran, Sindiket Mingshu jelas bersalah atas kecuaian atau peninggalan dalam memberikan Long kuasa penuh untuk menguruskan tanah tersebut sebagai tuan punya untuk jangka masa yang lama. Jika Sindiket Mingshu mempunyai apa-apa ekuiti terdahulu dalam tanah tersebut, ia mesti ditunda kepada penentang. H I

Selanjutnya, di bawah s 89 Kanun tersebut, dokumen hakmilik daftar adalah bukti muktamad hakmilik. Sesiapa yang membuat carian hakmilik dalam daftar akan mendapati Long sebagai tuan punya berdaftar, bebas daripada bebanan dan bebas daripada apa-apa amanah, kecuali kaveat cacat Goh dan Ho. Mereka gagal menyatakan dalam permohonan mereka bahawa tanah tersebut adalah tertakluk kepada suatu amanah dan diestop daripada bergantung kepada amanah itu terhadap penentang yang akan terjejas atau tertipu oleh salah laku mereka (lihat ms 510H–I dan 511A–C); *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 diikut.

(9) Semua pihak yang mempunyai kepentingan berkenaan dengan tuntutan kepada tanah tersebut ada di hadapan hakim, iaitu perayu-perayu yang menuntut tanah tersebut untuk Sindiket Mingshu sebagai rakan-rakannya, dan penentang sebagai pembeli setelah membayar harga belian penuh untuk tanah tersebut dan terkilan oleh kewujudan kaveat persendirian. Atas fakta-fakta kes, tiada isu serius untuk dibicarakan, dan persoalan imbangan kemudahan atau imbangan keadilan tidak timbul (lihat ms 512E–H).]

**Notes**

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2428.

For cases on fraud alleged in sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2554–2555.

For cases on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1837–1896.

For cases on beneficial ownership, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2472–2474.

For cases on acquisition of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1164–2989.

For cases on accrual of cause of action, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1854–1855.

**Cases referred to**

*Abigail v Lapin & Anor* [1934] AC 491 (refd)

*A-G of the Gambia v Pierre Sarr N'Jie* [1961] AC 617 (follld)

*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 (follld)

*Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97 (refd)

*Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 (follld)

*Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (refd)

*Khoo Yoke Wah & Ors v Lee Choon Yam Holdings Sdn Bhd & Ors* [1991] 1 MLJ 414 (follld)

*Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (follld)

*Madan Lal & Anor v Ho Siew Bee* [1983] 1 MLJ 105 (refd)

*Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237 (folld)
*Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 (refd)
*Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330 (folld)
*PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 (folld)
*Saminathan v Pappa* [1981] 1 MLJ 121 (folld)
*Sim Kwang Mui Ivy v Goh Peng Khim* [1995] 1 SLR 186 (refd)
*Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 (folld)
*Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (folld)
*Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45; [1976] 2 MLJ 44 (folld)
*Yeong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614 (folld)

**Legislation referred to**

Johore Land Enactment s 72(i)
Land Acquisition Act 1960 s 23
Limitation Act 1953 s 9
National Land Code 1965 ss 43, 89, 323, 326, 327(1), 340, 344(3), 383(1), 417, 420
Partnership Act 1961 s 35(1)

**Appeal from**: Originating Summons No 24–440–1994 (High Court, Johor Bahru)

*Cecil Abraham* (*Rosita Yeo* and *Bhaskaran* with him) (*Yoe & Co*) for the appellants.
*Wong Kim Fatt* (*Christina Chia* and *Khor Loke Yew* with him) (*Christina Chia Ng & Partners*) for the respondent.

**Gopal Sri Ram JCA**: I have had the benefit of reading the draft judgment of my learned brother Mokhtar Sidin JCA and agree with his conclusions and the reasons for the same.

**NH Chan JCA**: I have had the advantage of reading the judgment of my lord Mokhtar Sidin JCA in draft and I agree with the reasons stated by him that the appeal be dismissed.

**Mokhtar Sidin JCA**: The appellants, Madam Wu Shu Chen (the sole executrix of the estate of Goh Keng How, deceased) and Ho Choo Wing ('Ho') being dissatisfied with a part only of the decision of the Court of Appeal given on 19 November 1996, have applied to the Federal Court for the following orders:

(1) That leave be given to the applicants by this honourable court to appeal against such part only of the order of the Court of Appeal dated 19 November 1996, whereby the Court of Appeal ordered that the

A vesting order made by Abdul Malik Ishak J dated 12 June 1995 vesting the land Lot 3523, held under Grant No 21957, Mukim of Pulai, District of Johor Bahru, in favour of the respondent herein be affirmed.

(2) That the applicants be given seven days from the date of this order to file and serve the notice of appeal.

B (3) That the costs of this application be costs in the cause.

(4) That this honourable court do grant such further or other relief that it may deem fit and just to grant in the circumstances.

*Background of the case*

C The case originated in the High Court at Johor Bahru where in Originating Summons No 24–440–1994 (see [1995] 3 MLJ 6), the respondent, Raja Zainal bin Raja Hussin, was granted leave to intervene and was made the first defendant and the appellant Ho, the second defendant. The plaintiff in the originating summons was originally one Goh Keng How ('Goh'), who died on 8 May 1995 at the age of 72 (see death certificate at p 592 of D appeal record). After Goh's death, his wife Madam Wu Shu Chen was substituted as the sole executrix of his estate. She is the first appellant in this appeal in place of Goh, and Ho is the second appellant. Goh, on 14 January 1989, entered a private caveat Serial No 193/89 as the managing partner of Mingshu Syndicate claiming a caveatable interest in the land in E question, ie Lot No 3523, Grant No 21957, Mukim of Pulai, District of Johor Bahru, measuring in area 399 acres 3 roods 20 poles ('the land'). Goh's caveat was subsequently extended by an ex parte order of court dated 20 June 1994 made in his application by way of the aforesaid originating summons. Ho also entered a private caveat Serial No 6759/94 on 20 June 1994 against the land as a partner of Mingshu Syndicate. The F respondent, after he (in prayer 1) and Ho (in prayer 2) had been made parties to the said Originating Summons No 24–440–1994 upon the respondent's application, sought the following orders (appeal record pp 104–105), supported by his affidavit of 16 July 1994 (appeal record pp 297–304):

G ...

(3) The ex parte order dated 20 June 1994 granted by Arifin Jaka J under this originating summons extending the private caveat registered under Serial No 193/89, Jilid 352, Folio 86 ('the private caveat'), entered by the applicant Goh Keng How against the land be set aside and the H private caveat be removed forthwith by the registrar of titles.

(4) In the event prayer (2) is granted, the private caveat registered under Serial No 6759/94, Jilid 895, Folio 58 entered by the second defendant, Ho Choo Wing, against the land be forthwith removed by the registrar of titles.

(5) Damages/compensation be assessed and paid by the applicant Goh I Keng How, and the second defendant, Ho Choo Wing, to the first defendant, Raja Zainal Abidin bin Raja Hussin under s 329 of the National Land Code 1965.

(6) The Registrar of Titles Johor, and/or any proper registering authority, be directed under s 417 of the National Land Code 1965 to register the

first defendant Raja Zainal Abidin bin Raja Hussin as the proprietor of the land notwithstanding any caveats, and in the event of any compulsory acquisition of the land, the compensation or award be paid to the first defendant, Raja Zainal Abidin bin Raja Hussin, by the land administrator or any other appropriate authority.

(7) The applicant Goh Keng How and the second defendant Ho Choo Wing do jointly and severally pay to the first defendant Raja Zainal Abidin bin Raja Hussin the costs of and incidental to this application.

...

Several affidavits were filed on behalf of the parties. The material facts as to the decisive events forming the primary issues and the other material issues stated below appear not to be in dispute. The case was fully argued before Abdul Malik Ishak J, with written submissions submitted by counsel for both sides.

The learned judge in a carefully considered reserved judgment dated 12 June 1995 found in favour of the respondent and made orders (appeal record pp 15–16) setting aside the order of 20 June 1994 which extended Goh's caveat and removing Goh's caveat and Ho's caveat, with costs and damages to be assessed. The learned judge also made a vesting order vesting the land in the name of the respondent, and he further ordered that the acquisition award of RM25,892,000 which was said to be deposited in court in the Johor Bahru High Court in another Originating Summons No 24–122–1995 be paid to the respondent. It is not clear from the record when the award was deposited in court. At pp 615–616 of the appeal record, there is a copy of the notice of award and offer of compensation in Form H dated 28 January 1995 signed by the land administrator offering (at p 616) the sum of RM25,892,000 as full compensation for the acquisition of the land. The appellants appealed to the Court of Appeal against the whole of the decision of the learned judge, and the appeal came up for hearing before the court on 18 and 19 of November 1996.

I have the benefit of reading the well researched written submissions submitted before the court by learned counsel for both sides. After the conclusion of the hearing of the appeal before the court and after an adjournment for further deliberation by the court on 19 November 1996, the court unanimously dismissed the appeal with costs and affirmed the consequential vesting order made by the learned judge. I now give my reasons for dismissing the appeal.

*Two primary issues*

The two primary issues before the court are whether: (i) the respondent is an aggrieved person; and (ii) Goh's and Ho's caveats should be removed, which calls for an enquiry into whether the appellants and the real claimants, Mingshu Syndicate, had any caveatable interest in the land.

On the first primary issue, if the respondent is found not to be an aggrieved person within the ambit of the provisions of s 327(1) of the National Land Code 1965 ('the Code'), the appeal must be allowed with costs and consequently the vesting order must be set aside. On behalf of

A the appellants, it was contended that the respondent was not an aggrieved person because he was not a bona fide purchaser of the land, he had notice of Goh's caveat and the consideration of RM8m appeared not to have been paid under the written sale and purchase agreement dated 25 June 1993 entered into between him and one Long Yoke Wee ('Long'). It was
B contended for the appellants that the entire transaction smacked of fraud and collusion. In this connection, at the hearing of the appeal, the court pointed out to Mr Cecil Abraham, leading counsel for the appellants, that in the statement of claim filed by Mingshu Syndicate, Goh and Ho as plaintiffs against Long and the respondent in Johor Bahru High Court Civil Suit No 22–328–1994 (appeal record pp 558, 576–586), there was
C not even an allegation of fraud committed by the respondent or the attesting advocate and solicitor in the transaction. The authorities are clear that fraud and conspiracy to defraud must be proved beyond reasonable doubt, and fraud must be actual fraud: see *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, *Saminathan v Pappa*
D [1981] 1 MLJ 121, *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 and *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 820. There is no evidence that the respondent had committed actual fraud in his transaction. Grave suspicion by the appellants is no proof of fraud. It was not in dispute that Long became the registered proprietor of the preceding title to the land, ie
E the old Grant No 339 on or about 17 November 1959 (appeal record p 518) and the registered proprietor of the land on 23 October 1967 (appeal record p 539) free of any encumbrances, right up to the date of the sale and purchase agreement dated 25 June 1993 and that no instrument of trust had been deposited by Goh or Mingshu Syndicate with the
F registrar of titles, except the caveat of Goh which was entered in 1989.

The Code contains no definition on who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal
G right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed. The respondent had paid the full purchase price to Long under the sale and purchase agreement dated 25 June 1993, which was duly stamped and attested by an advocate and solicitor. There was Long's acknowledgement of receipt dated 17 June 1993 of the full purchase money of the sum of
H RM8m, witnessed by his wife, Madam Ong Lim Neo and a commissioner for oaths (appeal record p 427). Madam Ong had also affirmed a statutory declaration before the commissioner for oaths (appeal record p 429) confirming the receipt by Long. At appeal record p 537 appears a letter dated 1 March 1994 addressed to Development & Commercial Bank Bhd
I from the legal firm of Lee Chai Eng Haris & Co, Johor Bahru confirming payment of the purchase price in respect of the land. In the light of the above evidence, the court accepted — as did the learned judge — the fact that the full purchase money for the land had been paid by the respondent to Long. I reproduce that letter of 1 March 1994 below:

The Manager
Development & Commercial Bank Bhd,
Menara TR, 161B, Jalan Ampang,
50450 Kuala Lumpur.

Dear Sir,

Re: Grant No 21957, Lot 3523, Mukim Pulai, District of Johor Bahru

We refer to the above matter.

We hereby confirm that the balance of the purchase price for above property has been fully settled.

We also confirm that the RM4m sum under the special condition of the sale and purchase agreement has been fully settled.

The relevant transfer in Form 14A under the Code in respect of the land (appeal record pp 435–437) duly executed by Long on 17 June 1993 and attested by an advocate and solicitor in favour of the respondent was given to the respondent together with the issue document of title for the land. This was stated in para 6 of the affidavit (appeal record p 298) of the respondent. Long had done everything he could as registered proprietor to transfer or divest his entire interest in the land to the respondent who had paid the full purchase price to Long. In my judgment, Long had thereby become a bare trustee holding the bare legal title to the land on trust for the respondent, who had become the beneficial owner thereof, within the bare trustee principle enunciated in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, which was affirmed on appeal by the Privy Council in [1976] 2 MLJ 44, and applied in a number of subsequent leading authorities. In *Temenggong Securities*, Ong Hock Sim FJ said at p 47:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants [the purchasers], are bare trustees for the appellants of the said land ... .

In *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, Lee Hun Hoe CJ (Borneo), in delivering the judgment of the (then) Supreme Court, said at p 331:

> By paying the full purchase price, the fourth respondent had become the beneficial owner. The first three respondents were merely bare trustees for the fourth respondent. There was therefore no interest against which the appellant's caveat could lie.

At p 332, the learned Chief Justice said:

> The submission of the fourth respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors had executed the memorandum of transfer in his favour. Also, most important, the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. However, we are satisfied that on the facts, he has the better equity.

In *Yeong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614, Peh Swee Chin SCJ said in the (then) Supreme Court at p 624:

> It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. Please see *Lysaght v Edwards* (1876) 2 Ch D 499 and this case was cited with approval very often in our courts, eg by the Federal Court in *Inter-continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145 and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee, ie unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russell of Killowen in *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 that (at p 164):
>
> > 'The Torrens system is designed to provide simplicity and certitude in transfers of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.'

In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, the Federal Court had very recently the occasion to survey the authorities and restate the bare trustee principle at p 29 where Edgar Joseph Jr FCJ said:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

Ho's caveat was entered very much later on 20 June 1994, ie well after the respondent had completed the transaction in 1993. Ho had not exhibited his caveat Form 19B. However, the respondent in para 15 of his affidavit affirmed on 16 July 1994 (appeal record p 302) stated that Ho entered his private caveat 'on the same or substantially the same grounds as the applicant Goh Keng How'. This is also stated in para 13 (appeal record p 579) of the statement of claim of Mingshu Syndicate, Goh and Ho. Therefore, Goh's caveat and Ho's caveat are in the same situation as representing the same interest of Mingshu Syndicate. The respondent affirmed in his affidavit of 16 July 1994 that Long had assured him 'that all these three pieces of land were free from all encumbrances and that he would apply to the registrar of titles to remove the private caveat of the applicant, Goh Keng How'. The respondent had no reason to disbelieve Long whose assurance he had relied upon. Before his death on 12 November 1994 (appeal record p 141), Long did apply for the removal of Goh's caveat to the registrar of titles who had issued a notice of intended removal of caveat in Form 19C to Goh, whereupon Goh applied for and obtained the ex parte order extending his caveat. Accordingly, I hold that the

respondent was a bona fide purchaser for valuable consideration and that he was an aggrieved person entitled to make his application to the court under s 327(1) of the Code for the removal of Goh's caveat and Ho's caveat (see *A-G of the Gambia v Pierre Sarr N'Jie* [1961] AC 617 and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45).

I now come to the second primary issue which is crucial to the appellants' case, ie whether the two caveats should be removed. This necessarily calls for an enquiry into whether Goh, as the managing partner of Minghsu Syndicate, under s 323 of the Code had stated the nature of his claim forming the basis of his application in Form 19B under s 323(2), which had to be verified by his statutory declaration under s 323(3). This important s 323 merits full reproduction below:

> 323 Applications for entry of private caveats
>
> (1) The persons and bodies at whose instance a private caveat may be entered are —
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in para (b).
>
> (2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.
>
> (3) Any application under this section shall be accompanied by the prescribed fee and, so far as it sets out the claim giving rise thereto, be verified by a statutory declaration by the applicant or his advocate and solicitor.

Paragraph 2 of Form 19B reads simply thus:

> 2 The grounds of my claim to the land/interest are ... .

The basis of Goh's claim to the land is best described in his own words in para 2 of his Form 19B, which were quoted in para 7 of the respondent's affidavit dated 16 July 1994 challenging the caveatable interest of Goh. The said para 7 is reproduced below, with Goh's own words emphasized by me:

> (7) Prior to the signing of the said sale and purchase agreement, my search at the land registry on the said caveat did not reveal any caveatable interest of the applicant, Goh Keng How. It showed that the said Long Yoke Wee has, for over a very long period of more than 30 years been the registered proprietor of the said land without notice of any adverse claim to the title against him on the register document of titles in respect of the said land. At all material times, there was nothing to show Long Yoke Wee's registered title was defective on the register

A document of titles. In his statutory declaration in support of the entry of the said caveat in 1988, Goh Keng How affirmed that para 2 of his application was true and correct. There is nothing in the said para 2 to show the proper basis of his claim, as the managing partner of Mingshu Syndicate. The said para 2 reads as follows:

B '*The grounds of our claim to the land are that we claim a caveatable interest on the land referred to in the schedule hereto by virtue of certain document which clearly indicate our interest in the said land.*' (Emphasis added.)

In the course of the hearing of the appeal, the court indicated to Mr Cecil Abraham that he would have to get over the hurdles of the judgment of the C Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 in which my learned brother Gopal Sri Ram JCA propounded the three-stage approach to be adopted by a court in the hearing of an application by an aggrieved person under s 327(1) of the Code for the removal of a private caveat. This approach in *Luggage Distributors* was applied by the Court of Appeal in *Murugappa Chettiar* D *Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782. In *Luggage Distributors*, the learned judge said on the first stage at p 741D:

> The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are *insufficient in law* to support a caveat, then *cadit quaestio*, and the caveat must be removed E without the necessity of going any further.

I may summarize that in the second stage, the caveator must go on to show that, on the basis of the affidavits filed, his claim raises a serious question to be tried. The caveator must cross the first two hurdles before he can arrive at the third stage which deals with the question of balance of F convenience or balance of justice.

As can be seen in the said para 2 above, Goh had not disclosed what that so-called 'certain document' was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the G instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be. The notice to the world at large would have been effective if Long had been registered 'as trustee' under s 344, with the trust instrument deposited with the registrar of titles under s 344(3) of the Code. Mr Cecil Abraham candidly admitted that he could not get over the first hurdle in *Luggage* H *Distributors*. In my opinion, failure by a caveator such as Goh or Ho to cross that first hurdle would be sufficient for the court to remove his caveat and dismiss his appeal, as I have no doubt in my mind that Goh, Ho, or Mingshu Syndicate had no caveatable interest in the land. Accordingly, I dismissed the appeal with costs.

I In the court below, the learned judge had found the respondent to be a bona fide purchaser having paid the full purchase price. The respondent had also in his summons in chambers in prayer (6) above prayed to be registered 'as the proprietor of the said land'. The learned judge ordered that the land be vested in the name of the respondent.

It was contended on behalf of the appellants that because of the compulsory acquisition of the land, the court would be wrong to grant the vesting order. A short answer to that contention is that there is nothing in the Code or the Land Acquisition Act 1960 to prohibit the court from making a vesting order consonant with the justice of the case. Section 327(1) of the Code permits the court to make such other just order and under s 417, the court may by order direct the registrar of titles to give effect to the order. Section 420 of the Code makes provisions for the registration of a vesting order. Sections 327(1) and 417(1) read as follows:

> 327 Removal of private caveats by the Court
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.
>
> 417 General authority of the Court
>
> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.

As a land reference judge who had heard hundreds of land acquisition cases, I was interested to find out whether the land had actually been acquired or there was only an intended acquisition at the material time. I examined a copy of the register document of title certified under s 383(1) of the Code on Grant No 21957 to the land, exhibited as exh RZA-7 to the affidavit of the respondent affirmed on 11 October 1995 and filed in this court in opposition to the appellants' application for stay pending appeal to the Court of Appeal (see [1995] 3 MLJ 224). That Grant No 21957 showed an endorsement of the vesting order signed and sealed by the registrar of titles on 31 July 1995, vesting the land in the name of the respondent and that the vesting order was presented for registration and was duly registered in Serial No 6004/95, Jilid 648, Folio 57, dated 28 July 1995, at 10.31am. This fact appears in paras (2) and (3) of the respondent's said affidavit reading as follows:

> (2) I crave leave to refer to the order of the Johor Bahru High Court dated 12 June 1995 wherein Abdul Malik Ishak J ordered, inter alia, that the land known as Grant 21957 Lot 3523 Mukim of Pulai ('the said Land'), which is the subject of the above action, be vested in me.
>
> (3) On 28 July 1995, I presented the said order of court through Messrs Gulam & Wong by their letter dated 28 July 1995 at the Johor Bahru Registry of Titles. A copy of Messrs Gulam & Wong's letter dated 28 July 1995 is now shown to me and is annexed thereto as exh RZA 6. On 28 July 1995, the private caveats in question, Jilid 895, Folio 58 and Jilid 352, Folio 86, were removed and the said land was duly vested in me as registered proprietor. A copy of the certified true copy of the register document of title to the said land is now shown to me and is annexed hereto as exh RZA-7.

The effect of the vesting order is that the land is beneficially owned by the respondent. Even assuming the land had actually been acquired by the appropriate authorities upon the service of Form K when the learned judge made the order on 12 June 1995, that acquisition does not take away the vested right of the respondent in the land or any proceeds of acquisition or sale arising therefrom. There was an endorsement dated 2 July 1994 of an intended acquisition. However, there was no endorsement of the land having actually been acquired as at 31 July 1995. On that date, the registrar of titles had not made any memorial that the land had been acquired under s 23 of the Land Acquisition Act 1960 reading as follows:

> Entry in register
>
> 23 The proper registering authority, upon receipt of the notice in Form K, or the Land Administrator of his own motion after completing Form K, shall, upon the register document of title or other appropriate record in his possession as specified in s 9(2) or (3), make with respect to any scheduled land a memorial —
>
> (a) that the whole of such land has been acquired and has vested in the State Authority; or
>
> (b) that so much of the land as is specified in the last column of the schedule to such Form has been acquired.

Registration of the vesting order with effect from 28 July 1995 would confer indefeasibility of title on the respondent under s 340 of the Code and defeat or extinguish other unregistered equitable interest in respect of the land.

In *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97, a decision under the repealed FMS Land Code, the applicant Bachan Singh had obtained the transfer from the first respondent Mahinder Kaur but was unable to register it for technical reasons which appear in the judgment of Thomson J (as he then was). In directing the applicant to be registered as proprietor of 30/147 undivided shares in the land in question, the learned judge said in the course of his judgment at pp 97–98:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code ... .
>
> ... If he wishes to deal with these rights by vesting them in or rather transferring them to himself and taking the necessary step to convert them into real rights, he is entitled to do so. He is, however, unable to do so for technical reasons which are abundantly clear — the failure to register timeously the original transfer and the death of one of the parties from whom his authority flows. It seems to me that what he is doing here is to invoke the powers given to the court by s 240 of the Land Code to enable him to surmount these technical difficulties.

In view of the then pending compulsory acquisition of the land, Mr Wong Kim Fatt, leading counsel for the respondent, submitted that the learned judge was right in the circumstances to make the vesting order, and that had there been no caveats entered by Goh and Ho, the transfer of the land in Form 14A would have been registered in favour of the respondent in the usual way. I agreed with Mr Wong and the learned judge and therefore affirmed his vesting order.

The court invited Mr Abraham and Mr Wong to address the court on the question of payment of the award of RM25,892,000 to the respondent. Although the effect of the vesting order would make the respondent the beneficial owner of the land, after hearing Mr Abraham and Mr Wong on the order of payment of the said award out of court to the respondent, the court agreed with Mr Abraham and set aside the order of payment of the award to the respondent made by the learned judge in the Originating Summons No 24–440–1994 from which this appeal arose, as the court was of the opinion that the proper procedure is for the respondent to apply to the Johor Bahru High Court for an order for payment out to him in the other appropriate Originating Summons No 24–122–1995 in which, on the application of the Land Administrator, Johor Bahru the order for payment into court of the compensation award of RM125,892,000 was made for the compulsory acquisition of the land. The respondent accepted this part of the court's decision as he had not applied for leave to appeal against it and I need say nothing more on it.

*Other issues*

The appellants must have accepted the court's decision on the above two primary issues which the court unanimously found in favour of the respondent, as they have not sought leave from the Federal Court to appeal against that decision which disposed of the appeal by the appellants. However, if this court is wrong in dismissing the appeal with costs on the above two primary issues, I now proceed to consider several other material issues raised before the court in the written submissions of counsel on behalf of the appellants and the respondent. These issues had been fully considered by the learned judge. In my judgment, upon a careful consideration of these issues and of the respective written submissions, I would also have dismissed the appeal with costs on the following grounds.

*Mingshu Syndicate*

The first of these issues that came to my mind is the entity called 'Mingshu Syndicate' which features throughout these proceedings. The appellants claimed that by a trust instrument dated 2 July 1963 (appeal record p 407) executed by Long, he held 43000/152900 undivided shares in the larger lot of land known as Lot No 254, held under the old Grant No 339 (appeal record p 516–519), District of Johor Bahru, on trust for Mingshu Syndicate. There were provisions with the object of giving notice to the world at large under s 72(i) of the now repealed Johore Land Enactment ('the Enactment') for the registration of Long 'as trustee' and for the deposit of the trust

instrument, but unfortunately for Mingshu Syndicate, this was never done in respect of the old Grant No 339 issued under the Enactment which was repealed by the Code as from its commencement. This material omission under the Torrens system would result in a serious prejudice to a person making a title search in the registry in that he would never know that Long was a trustee for Mingshu Syndicate. This omission on the part of Mingshu Syndicate must be held against it. Section 72(i) of the Enactment reads as follows:

> 72(i) When the proprietor of any land shall transfer the same to trustees, the Commissioner shall not make any entry in the register of the trusts, but he shall register the fact that the persons in whose favour the instrument is granted are trustees by adding the words 'as trustees' after their names and designations in the register; and the instrument creating the trust, or a duplicate or certified copy thereof, may be deposited in the registry for safe custody and reference.

I now reproduce the relevant paragraphs of the trust instrument dated 2 July 1963 below:

> AND WHEREAS I, LONG YOKE WEE (I/C No S555085514) of No 16, Puey Hoe Avenue, Singapore, stand seised of 43000/152900 undivided share right title and interest in all that piece of land containing an area of 1,529 acres 0 roods 00 poles or thereabouts and situated in the Mukim of Gelang Patah in the District of Johor Bahru and comprised in the Government of Johor Grant No 339 for Lot No 254 ('the said land').
>
> Now, I the said LONG YOKE WEE hereby acknowledge that all the share capital and assets of the said company as well as the said land whereof I stand seised of 43000/152900 undivided share right title and interest therein RIGHTFULLY belong to the said company AND I hereby for myself, my heirs, executors and administrators and assigns declare that I have no interest claim or demand in respect of my said share in the said land and the share capital and assets of the said company.
>
> Dated at Singapore 2 July 1963.

The affidavit of Goh affirmed on 1 October 1994 (para 8, appeal record p 371) shows that Mingshu Syndicate was registered as a partnership on 19 June 1963. I reproduce that para 8 below:

> 8 In reply to para 9 of the proposed intervener's second affidavit, I am advised and verily believe that Mingshu Estate and Johor Farms and Plantations was the name used by an unregistered partnership of a group of entrepreneurs which was later registered on 19 June 1963 under the name Mingshu Syndicate and carried on business as before. Therefore, I verily believe that Mingshu Estate and Johor Farms and Plantations is the same as Mingshu Syndicate.

The official search on Mingshu Syndicate (exh RZA-12 at appeal record 455–460) shows, and it is common ground, that Mingshu Syndicate was registered as a partnership on 19 June 1963. The search shows that it commenced business four days earlier on 15 June 1963. There is no evidence to show that Mingshu Estate and Johor Farms and Plantations was ever registered or is the same entity as Mingshu Syndicate. On the face

of it, they are two different entities. At the material time on 15 or 19 June 1963, Goh and Ho were not partners of Mingshu Syndicate and had therefore no interest therein on those dates: see *Yeong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614 on the three essentials of a valid trust. These two gentlemen became its partners only in the following year on 16 January 1964 (see Goh's affidavit, para 10, appeal record pp 323 and 456–457). On the evidence before the court, I regret to state that there was no written partnership agreement produced, and there was no proof to show that there was an agreement between the existing partners made for the partnership to continue in the event of the death of any partner. Absence of an agreement for the partnership to continue in the event of death or bankruptcy of any partner would expose the partnership like Mingshu Syndicate to a very precarious situation as an on-going business concern, because the law relating to the dissolution of partnership upon the death or bankruptcy of a partner would apply eventually to Mingshu Syndicate: see *Khoo Yoke Wah & Ors v Lee Choon Yam Holdings Sdn Bhd & Ors* [1991] 1 CLJ 663, *Mat Shah bin Mohamed v Foo Say Meng* [1984] 1 MLJ 237 at p 239 and s 35(1) of the Partnership Act 1961 which provides as follows:

> 35(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

As time went on, it took its toll against Mingshu Syndicate as its partners had not taken the precaution to make the necessary agreement catering for the partnership to continue in the event of the death or bankruptcy or any one partner. Unfortunately, as far back as over 30 years ago, on 18 May 1965, one Tan Geok Gim, a partner of Mingshu Syndicate, died (appeal record p 460), thereby dissolving Mingshu Syndicate as a partnership under s 35(1) of the Partnership Act 1961. To make the situation worse for Mingshu Syndicate, another partner, one Lee Ah Soo died the following year on 28 November 1966 (appeal record p 460) and some 29 years later, on 8 May 1995, Goh himself died. Thus, on the undisputed evidence before this court and before the court below, I have no other choice except to hold that Mingshu Syndicate was dissolved on 18 May 1965 when the first death of a partner occurred. I may also state that a partnership firm is not a legal persona (see *Madan Lal v Ho Siew Bee* [1983] 1 MLJ 105). Further, under s 43 of the Code, a partnership like Mingshu Syndicate is not a person or body which can hold land in its own name. Section 43 reads as follows:

> 43 Persons and bodies to whom land may be disposed of
>
> Subject to the provisions of Part Thirty-Three (A), the powers of disposal conferred on the State Authority by s 42 may be exercised only in favour of, and application for their exercise may be accepted only from, the following persons and bodies —
>
> (a) natural persons other than minors;
>
> (b) corporations having power under their constitutions to hold land;

(c) sovereigns, governments, organizations and other persons authorized to hold land under the provisions of the Diplomatic and Consular Privileges Ordinance 1957; and

(d) bodies expressly empowered to hold land under any other written law:

Provided that it shall not be necessary for a corporation to have power to hold land in order for it to be able to apply for, and be issued with, a permit to extract and remove rock material.

*Limitation and laches*

The next material issue of relevance which I need to consider is on limitation and laches raised on behalf of the respondent. Goh had stated in his affidavit dated 13 June 1994 (para 4, appeal record p 285) that on 2 November 1968, Long had agreed to deliver but failed to deliver by *4 November 1968* the blank transfer form relating to the land. This undisputed material fact was reaffirmed by Goh in para 5 of his subsequent affidavit of 11 August 1994 (appeal record p 320), reproduced below:

(5) Further, at a meeting of partners of Mingshu Syndicate held on 2 November 1968, Long Yoke Wee agreed to transfer the title deeds including the title deeds of the said land belonging to Mingshu Syndicate held in trust by him to Mingshu Syndicate. He also agreed to hand the blank transfer forms pertaining to the abovesaid transfers to Mingshu Syndicate's solicitors *by 4 November 1968. However, he failed to do so.* A copy of the acknowledgement at the meeting on 2 November 1968 has been exhibited as exh GKH-2 to my affidavit affirmed on 13 June 1994 filed herein. (Emphasis added.)

This affidavit of Goh is a double-edged sword. Understandably, it was intended to strengthen his case and to show that, as demanded by Mingshu Syndicate, Long had agreed to give back the land to Mingshu Syndicate by transferring it to the Syndicate by the stipulated date on 4 November 1968. However, Long had, in the words of Goh, 'failed to do so'. This failure on Long's part should have triggered off timeous legal action on the part of Goh, Ho or Mingshu Syndicate. It was contended for the respondent that the cause of action accrued when Long failed to deliver the transfer forms and the issue documents of title on 4 November 1968. It was contended for the appellants that Mingshu Syndicate's cause of action accrued very much later on 25 June 1993 when Long sold the land to the respondent. It appeared clear to me that Mingshu Syndicate's cause of action for the recovery of the land accrued when Long had failed or defaulted to deliver the transfer and the issue document of title to the land on *4 November 1968* when time began to run. In order to prevent limitation from setting in, Mingshu Syndicate, assuming it had the legal capacity, must institute its action within 12 years from 4 November 1968. This it clearly failed to do, and it has only itself to blame. The provisions of s 9 of the Limitation Act 1953 are clear. It reads as follows:

9 Limitation of actions to recover land

(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action

> accrued to him, or if it first accrued to some person through whom he claims, to that person.

The appellants and Mingshu Syndicate filed their claim in their very untimeous Civil Suit No 22–328–1994 (appeal record p 558) against Long and the respondent as defendants on 19 October 1994 in the Johor Bahru High Court for the recovery of the land which was registered in the name of Long as proprietor free of any trust or encumbrances on 23 October 1967 (appeal record p 529). As the civil suit affects adversely the beneficial interest of the respondent in the land and consequently his right to receive the said award of RM25,892,000, he is entitled, as an aggrieved person, to raise the question of limitation which had set in 12 years after 4 November 1968, ie on 4 November 1980. The learned judge was not precluded from deciding the relevant issues before him, as all the interested parties were before him. Thus, the claim of the appellants and Mingshu Syndicate in their Civil Suit No 22–328–1994 was filed some 14 long years out of time and was barred by limitation.

I agree with the learned judge for his reasoning that Goh, Ho and Mingshu Syndicate are also barred by laches from asserting their interest in the said land as against that of the respondent. The learned judge, after referring to the Privy Council case of *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 and the English Court of Appeal case of *Allcard v Skinner* (1887) 36 Ch D 145, said at pp 55–56 of his judgment ([1995] 3 MLJ 6 at pp 29–30):

> Just like *Allcard v Skinner*, it would truly be unjust after almost 30 years to allow the alleged beneficiaries to assert their interests to the said land as against that of Raja Zainal Abidin. Goh, Ho and the other alleged beneficiaries were businessmen, intelligent, fully aware of their legal rights and most importantly they had legal advice on the matter. It must be inferred that when Long refused to hand over the blank transfer forms on 4 November 1968, they had the advantage of legal advice and they chose to let Long continue to be the registered proprietor of the said land. Bluntly put, they have acquiesced Long's title to the said land for almost 30 years and now they are estopped and barred by laches from asserting their alleged interests.

It is most unfortunate that Goh, Ho and Mingshu Syndicate have only themselves to blame for the limitation and laches on their part. The respondent had nothing to do with the limitation and laches.

*Negligent acts and omissions of Mingshu Syndicate*

By allowing the preceding title Grant No 339 to be registered in the name of Long as proprietor and not as trustee in 1959 and allowing the present title Grant No 21957 to the land to be registered in the name of Long in 1967 also as proprietor, and not as trustee under s 344 of the Code, and in failing to deposit the trust instrument with the registry of titles, and in allowing Long to retain possession of the issue document of title, Mingshu Syndicate was clearly guilty of negligence or omission in arming Long with full power to deal with the land as proprietor over an incredibly long period of time. If Mingshu Syndicate has any prior equity in the land, it

must be postponed to that of the respondent. Clearly, the decision in the well-known Privy Council case of *Abigail v Lapin & Anor* [1934] AC 491 is against the appellants.

Under s 89 of the Code, the register document of title is conclusive evidence of title: see *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7. Anyone making a title search in the registry would find Long as the registered proprietor, free of encumbrances and free of any trust, except the defective caveats of Goh and Ho. They failed to state in their applications that the land was subject to a trust and they are now estopped from relying on the trust against the respondent who would be prejudiced or misled by the misconduct of Goh and Ho. In this regard, the learned judge at appeal record pp 39–40, referred to *Sim Kwang Mui Ivy v Goh Peng Khim* [1995] 1 SLR 186, in which Kan Ting Chiu J in the High Court of Singapore decided that a caveator would not be permitted to justify his caveat on grounds other than those stated in the caveat. On appeal, the decision was affirmed by the Singapore Court of Appeal. Had Goh or Ho entered or caused the entry of a trust caveat under ss 332 and 333 of the Code, the trust caveat would serve to give notice to the world at large that the land was subject to a trust. By itself, a private caveat is not a remedy, and it does not create an interest in land. The caveat temporarily freezes the register document of title until timeous legal action is instituted for the determination of the dispute. Counting from 1959, when Long became the registered proprietor of the old Grant No 339 (appeal record p 518), Mingshu Syndicate had armed Long with the preceding title to the land and represented to the world at large that Long was the beneficial owner thereof free of any trust for an unprecedented and incredibly long period of over 33 years up to 1993 when the respondent purchased the land under the sale and purchase agreement. Counting from 23 October 1967 when the new Grant 21957 (appeal record p 539) was registered in the name of Long free of any trust, the period would still be a very long one of some 25 years up to 1993 when the respondent executed the agreement. The learned judge had at pp 61 and 62 of his judgment summarized under six items the acts or omissions of Goh or Ho or Mingshu Syndicate which 'had the effect of inducing Raja Zainal Abidin to act to his prejudice' ([1995] 3 MLJ 6 at p 24). I respectfully agree with his findings.

*No serious question to be tried*

The onus was on the respondent Raja Zainal Abidin — as he was not the registered proprietor of the land at the time of his application — to show how he was an aggrieved person under s 327(1) of the Code. The procedure and onus for removal of a caveat under ss 326 and 327 of the Code had been clearly stated by Lord Diplock in the Privy Council case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 at p 215. Once the respondent had satisfied the court that he was a person aggrieved by the existence of the caveats (which he had), the onus would be on Goh and Ho as caveators to satisfy the court that their claim and that of Mingshu Syndicate had raised serious questions to be tried in their said civil suit, and having so satisfied that court, the appellants as caveators must go on to show that, on the

balance of convenience, it would be better to maintain the caveats until the trial of the civil suit.

A copy of the writ dated 19 October 1994 in the Johor Bahru High Court Civil Suit No 22–328–1994 filed by Mingshu Syndicate, Goh, and Ho as plaintiffs is exhibited by their solicitor at appeal record p 558–560. The statement of claim dated 18 October 1994 in Bahasa Malaysia and English appears at appeal record pp 564–586. The two defendants to this suit are Long and the respondent, Raja Zainal Abidin bin Raja Hussin. According to the affidavit affirmed on 28 January 1995 of Miss Rosita Yeo Swat Geok, solicitor for the plaintiffs, the writ had not been served on the defendants by the date of her affirmation (appeal record p 562). The learned judge at appeal record p 88 observed ([1995] 3 MLJ 6 at p 33):

> On 19 October 1994, Long was still alive, he died only on 12 November 1994 and yet there was no attempt to serve the writ.

In a nutshell, Mingshu Syndicate in the civil suit is seeking the recovery of the land. It was the contention of the appellants that the question of the disputed facts, competing equity, limitation and laches should not be enquired into in the originating summons but rather at the trial of the civil suit. They contended that there were triable issues in the suit. It was contended otherwise on behalf of the respondent.

In my judgment, all interested parties in respect of the claim to the land were before the learned judge, ie the appellants claiming the land for Mingshu Syndicate as its partners, and the respondent as the purchaser having paid the full purchase price for the land and aggrieved by the existence of the private caveats of Goh and Ho. No trial is necessary to determine if the respondent is an aggrieved person. The appellants, admittedly, could not even get past the first hurdle in *Luggage Distributors'* case. In other words, the appellants and Mingshu Syndicate had no caveatable interest in the land. Thus, on this issue alone, the caveats must be removed and this too does not require a trial. On the above two primary issues found in favour of the respondent, the situation is even clearer now that they do not form triable issues since the appellants have not sought leave to appeal to the Federal Court. There is also no need to have a trial on the dissolution of Mingshu Syndicate on the deaths of its partners as the facts are not in dispute and the law is clear. The accrual of the cause of action on 4 November 1968 and the question of limitation and laches are based on the undisputed affidavit evidence of Goh himself. The said Civil Suit No 22–328–1994 was, as stated before, filed some 14 long years out of time. No trial is required to determine this obvious fact. I therefore hold that on the above primary and material issues, there is no serious issue to be tried in the civil suit, and the question of balance of convenience or balance of justice does not arise.

*Appeal dismissed.*

Reported by Jafisah Jaafar